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14 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
15 IN AND FOR THE COUNTY OF MARICOPA

16 THE STATE OF ARIZONA ex rel. THOMAS C.
17 HORNE, the Attorney General, and THE CIVIL
18 RIGHTS DIVISION OF THE ARIZONA
19 DEPARTMENT OF LAW,

20 Plaintiff,

21 and MONICA KUHLT, a single woman,

22 Plaintiff-Intervenor,

23 vs.

24 CITY OF COTTONWOOD; and CITY OF
25 COTTONWOOD POLICE DEPARTMENT,

26 Defendants.

No. CV2009-014365

**STATE'S SECOND AMENDED
COMPLAINT**

(Hon. Dean M. Fink)

Plaintiff, the State of Arizona ex rel. Terry Goddard, the Attorney General, and the Civil Rights Division of the Arizona Department of Law (collectively the "State"), for its Complaint alleges as follows:

INTRODUCTION

This is an action brought under the Arizona Civil Rights Act to correct unlawful employment practices, to provide appropriate relief to an aggrieved person, and to vindicate the public interest. Specifically, the State brings this matter to redress the injury sustained because, at the time Charging Party Monica Kuhlert ("Kuhlert") was applying to be promoted to sergeant in December 2006, Defendants adopted a physical fitness test and performance standards that Defendants knew had a disparate impact on women. Defendants had not validated the physical fitness test or performance standards as job related or necessary to the position of sergeant (or to any other law enforcement position with Defendants) and had not considered less restrictive physical fitness testing standards that would satisfy Defendants' actual business needs without adversely affecting female police officers or applicants.

The physical fitness test and performance standards were incorporated into a set of testing protocols and procedures set forth in General Order 206. Although General Order 206 did not require officers like Kuhlert who had been hired before January 1, 2007, to pass the physical fitness test until January 1, 2010, Defendants used Kuhlert's inability to pass the test as a pretext to deny her promotion to sergeant twice in 2007 and once in 2008, and to promote less-qualified men in her stead. More, Defendants relaxed testing protocols and passing standards for at least one man who applied to the CPD after January 1, 2007, to allow him to enter the police training academy, while holding Kuhlert and a state-certified female police officer who applied to the CPD after January 1, 2007, to more rigorous standards to prevent them from being promoted or hired. Finally, because Kuhlert opposed Defendants' discriminatory application of the General Order 206 physical fitness test, Defendants retaliated against her by, among other things, denying her an important training opportunity; requiring her to submit to an unwarranted medical examination; and placing her on light duty for five months when similarly situated male officers were not placed on light duty at all, purportedly because she was medically "unfit" for duty, although Kuhlert's own physician represented there

1 were "no contraindications" to her performing all her CPD duties. Therefore, Defendants'
2 actions in this case constitute disparate impact and disparate treatment employment
3 discrimination based on sex in violation of the Arizona Civil Rights Act, A.R.S. § 41-
4 1463(B)(1) & (2), and retaliation in violation of A.R.S. § 41-1464(A).

5 JURISDICTION AND VENUE

6 1. This Court has jurisdiction of this matter pursuant to A.R.S. § 41-1481(D).

7 2. Venue is proper in Maricopa County pursuant to A.R.S. § 12-401(17).

8 PARTIES

9 3. The Civil Rights Division of the Arizona Department of Law is an administrative
10 agency established by A.R.S. § 41-1401 to enforce the provisions of the Arizona Civil Rights
11 Act, A.R.S. § 41-1401 *et seq.*

12 4. The State brings this action on its own behalf and on behalf of Monica Emma
13 Kuhl, an aggrieved person, as provided by A.R.S. §§ 41-1481(D) and (G).

14 5. Defendant City of Cottonwood ("Cottonwood") is an incorporated municipality
15 located in Yavapai County, Arizona. Cottonwood's City Hall is located at 827 N. Main Street,
16 Cottonwood, Arizona 86326.

17 6. Defendant Cottonwood Police Department ("CPD") is a department of
18 Cottonwood. CPD's headquarters is located at 199 S. 6th Street, Cottonwood, Arizona 86326.

19 7. Kuhl is currently a detective with CPD, where she has worked as a law
20 enforcement officer since approximately November 23, 1997.

21 8. Doug Bartosh ("Bartosh") currently is Cottonwood's City Manager. When the
22 physical fitness tests and standards set forth in General Order 206 were adopted, Bartosh was
23 CPD's Chief of Police.

24 9. Jody Fanning ("Fanning") currently is CPD's Chief of Police.
25
26

10. Gary Eisenga ("Eisenga") currently is a Commander for CPD. He formerly was a Patrol Sergeant and had primary responsibility for implementing and administering the physical fitness test set forth in General Order 206.

11. At all relevant times, Cottonwood and CPD (when collectively, "Defendants") were employers within the meaning of A.R.S. § 41-1461(4)(a).

12. At all relevant times, Kuhl has been an employee of CPD within the meaning of A.R.S. § 41-1461(3)(a).

13. The State is informed and believes and therefore alleges that Defendants were legally responsible for the acts or omissions giving rise to this cause of action and legally and proximately responsible for damages as alleged pursuant to A.R.S. § 41-1481(G).

BACKGROUND

14. Defendants allege that General Order 206 became effective on or about December 12, 2006. Pursuant to General Order 206, all CPD sworn personnel hired on or after January 1, 2007, would undergo mandatory physical fitness testing twice each year and be required to meet or exceed minimum performance standards set forth in the Order. All sworn members employed by CPD prior to January 1, 2007, would undergo mandatory physical fitness testing twice each year, but would not be required to meet or exceed the minimum standards until the third year following issuance of the Order. As such, sworn personnel employed by CPD before January 1, 2007, would not be required to meet or exceed the Order's physical fitness standards until January 1, 2010.

15. The physical fitness performance standards contained in General Order 206 were developed in a study conducted by Fitness Intervention Technologies ("FIT") in 2000 and 2001. FIT was commissioned by Arizona Department of Public Safety ("DPS") to conduct this study in order to identify and validate job-related physical fitness tests, standards and programs for applicants and recruits to the Arizona Law Enforcement Academy ("ALEA") and for incumbent officers of selected agencies. Some county and local police departments,

1 including CPD, also participated in the study by providing written information about the
2 physical performance demands for the job of "police officer" at their respective agencies.

3 16. The FIT study recommended implementing "absolute" physical fitness standards,
4 as opposed to the "relative" fitness standards based on age and gender used by many police
5 departments, to ensure that all officers could satisfy all of the performance demands of the
6 composite "police officer" job description. Additionally, whereas many agencies only require
7 new applicants to satisfy the relative physical fitness requirements, the FIT study also
8 recommended making passing absolute physical fitness standards mandatory for incumbent
9 officers as well.

10 17. The FIT study recommended that participating police agencies adopt a battery of
11 physical fitness tests, to be performed in sequence with brief rest periods between each test,
12 and require that both applicants and incumbent officers satisfy the minimum absolute standard
13 for each test. The FIT study physical fitness tests and performance standards are as follows:
14 (1) an agility run to be completed in 18.2 seconds or less; (2) a single repetition bench press of
15 175 pounds or 79% of the officer's body weight; (3) a vertical jump of not less than 16 inches;
16 (4) a 300 meter run in 60 seconds or less; (5) a maximum number of push-ups in succession
17 (but no fewer than 30); (6) not less than 34 sit-ups in one minute; and (7) a 1.5 mile run in not
18 less than 15 minutes and 4 seconds.

19 18. The FIT study demonstrated that making these absolute fitness standards
20 mandatory would have an adverse impact on female police officers. For example, testing of
21 the Phoenix Police Department conducted in the context of the FIT study yielded the following
22 relative fail rates for men and women: (1) agility run—27% for men; 94% for women; (2) 175
23 pound bench press—21% for men; 100% for women (2)(a) weight ratio bench press—7% for
24 men; 78% for women; (3) vertical jump—21% for men; 89% for women; (4) 300 meter run—
25 26% for men; 84% for women; (5) push-ups—24% for men; 84% for women; (6) sit-ups—
26 20% for men; 36% for women; and (7) 1.5 mile run—24% for men; 84% for women.

1 19. The FIT study stated that women could be expected to improve their performance
2 by 20 to 25% in 3 to 6 months with a moderate training program. The study also
3 acknowledged, however, that even with training, the average woman police officer may not be
4 able to satisfy the FIT standard for push-ups or the bench press.

5 20. By issuing General Order 206, Defendants adopted and made mandatory for all
6 applicants to the CPD force and all incumbent CPD sworn personnel the physical fitness
7 performance standards that the FIT study established had a disparate impact on female police
8 officers.

9 21. Upon information and belief, DPS did not adopt the physical fitness tests and
10 performance standards recommended by the 2000 FIT study. Instead, DPS requires recruits to
11 pass the Peace Officer Physical Aptitude Test ("POPAT"), for which cadets are trained in the
12 ALEA.

13 22. Upon information and belief, the CPD is the only Arizona law enforcement agency
14 that has adopted FIT's recommended physical fitness tests and performance standards.

15 23. In December 2006, CPD published a Promotional Process for the Position of
16 Police Sergeant ("Promotional Process") announcing two available sergeant positions in 2007.

17 24. The Promotional Process was limited to current employees, i.e., sworn CPD
18 personnel hired before January 1, 2007.

19 25. The Promotional Process mandated that the successful candidate satisfy the
20 physical fitness standards imposed by General Order 206 before being promoted to sergeant.

21 26. According to General Order 206, no CPD sworn personnel hired before January 1,
22 2007, would be required to satisfy the FIT study standards until January 1, 2010.

23 27. Defendants have not performed, or caused to have performed by any outside
24 agency, any study correlating performance on the General Order 206 battery of physical
25 fitness tests with performance of the job duties of a CPD sergeant.
26

1 28. Defendants have not performed, or caused to have performed by any outside
2 agency, any study correlating performance on the General Order 206 battery of physical
3 fitness tests with performance of any CPD law enforcement position.

4 29. Before General Order 206 was issued in December 2006, CPD had basic physical
5 fitness requirements for applicants to the force but did not require its incumbent officers—
6 including incumbent officers seeking promotion—to take or pass a physical fitness test.

7 30. Kuhlert was the only woman to apply for the CPD sergeant positions available in
8 2007.

9 31. Kuhlert is the only woman ever to apply for promotion to sergeant at the CPD.

10 32. As required by the Promotional Process, Kuhlert submitted a written application,
11 took a written exam on January 1, 2007, and an oral exam on January 17, 2007. Kuhlert's total
12 score on these exams was the second highest of all officers who applied to promote to sergeant
13 at that time.

14 33. Over her nearly 13 years with the CPD, Kuhlert has received many commendations
15 and letters of recognition from her superiors, other law enforcement agencies, prosecutors and
16 the public.

17 34. Because Kuhlert was under the care of a physician for a back injury and had not
18 been released to take the physical fitness exam, the first of two available sergeant positions
19 was given to a male officer who passed the physical fitness test on January 16, 2007, and was
20 promoted on February 18, 2007.

21 35. After being released by her doctor, Kuhlert took the physical fitness exam on April
22 25, 2007, and July 10, 2007. On each of these tests, Kuhlert met the FIT standards for the bench
23 press, vertical leap, push-ups and sit-ups but did not meet the standards for the agility run (18.7
24 seconds in April; 18.3 seconds in July); 300 meter run (71 seconds in April; 69 seconds in
25 July); and the 1.5 mile run (17:47 in April; 17:43 in July).

1 36. Kuhlt would have taken the test again in October 2007, but due to continuing back
2 problems exacerbated by ongoing training to try to pass the physical fitness test that required
3 further treatment, was advised by her doctor not to run for 30 days.

4 37. On October 17, 2007, Bartosh, who at that time was still CPD Chief of Police,
5 wrote Kuhlt informing her that, although she was then the top-ranked candidate for sergeant,
6 he would be giving the other available position to another applicant because she had not yet
7 passed the fitness test and it was unclear when she could be prepared to do so. Accordingly,
8 another male officer, who had passed the physical fitness exam on December 5, 2006, and
9 October 20, 2007, was promoted to sergeant on October 28, 2007.

10 38. Pursuant to General Order 206, Kuhlt took the physical fitness test again on
11 January 16, 2008, and again did not pass the running components of the test. She also did only
12 30 sit-ups in one minute.

13 39. On April 4, 2008, Kuhlt wrote a memorandum to Fanning, who was then the
14 Interim Chief of Police, and the CPD Human Resources Department, expressing her concerns
15 about the disparate impact that the physical fitness test had on female officers and her belief
16 that the fitness test operated as a "glass ceiling" preventing her promotion.

17 40. In an April 21, 2008, letter responding to Kuhlt, Fanning agreed that the fitness
18 test had a disparate impact on women, but maintained that it was allowed because the fitness
19 standards were "job related for the position in question and consistent with business
20 necessity." Fanning's letter to Kuhlt also cited the statement from the FIT study that, with 3 to
21 6 months moderate training, female officers could improve their performance on the physical
22 fitness tests by 20 to 25 percent.

23 41. In May 2008, two more sergeant positions became available at CPD. In the May
24 2008 promotional process, as opposed to the one posted in December 2006, a candidate who
25 had not yet passed the physical fitness exam could not take the written or oral exams for
26 sergeant.

1 42. In another attempt to qualify for promotion, Kuhlth took the physical fitness test on
2 May 12, 2008. That time, she passed the agility run and bench press, but only jumped 15
3 inches on the vertical jump. She also did only 30 sit-ups in one minute, and ran the 300 meters
4 in 72 seconds. Detective Kuhlth re-injured her back during the 1.5 mile run, which she
5 nevertheless completed in 19 minutes and 17 seconds.

6 43. Two male applicants who passed the May 12, 2008, fitness test were promoted to
7 sergeant on June 22, 2008, and August 17, 2008, respectively.

8 44. As a result of the back injury sustained during the May 12, 2008, fitness test,
9 Kuhlth filed a worker's compensation claim against CPD.

10 45. In the last quarter of 2008, CPD held testing for a law enforcement officer
11 position.

12 46. A female officer named Lori Carver ("Carver"), who had been certified by DPS in
13 January 2008, tested among other individuals.

14 47. Carver was the only previously certified officer to test for the CPD position at that
15 time.

16 48. Because Carver had been previously certified as a law enforcement officer, CPD
17 policy did not require that she take the written exam. Carver was required to take an oral
18 exam, however, which she passed.

19 49. A male applicant named Clint Combs ("Combs"), a personal friend of a CPS
20 sergeant and with whom Eisenga had played golf, also tested on the same day as Carver.

21 50. Because Combs was not a previously certified police officer, he was required to
22 take both the written and oral exams.

23 51. According to CPD policy, an applicant must score a total of 70% on the written
24 and oral exams to be eligible to take the physical fitness exam, which CPD placed at the end of
25 the application process for new hires.
26

1 52. Combs' total score on the written and oral exams missed the cut-off by a few
2 tenths of a percent.

3 53. In consultation with Fanning, Eisenga rounded Combs' score on the written test up
4 to 70% to allow Combs to take the physical fitness test.

5 54. Although others had taken the written and oral exams, Carver and Combs were the
6 only applicants who were allowed to take the physical fitness exam.

7 55. Eisenga asked Carver to do the bench press—a test the FIT study indicated women
8 police officers uniformly had problems passing, even after specific training—as the initial test,
9 even though it is listed second, after the agility run, in the FIT recommendations.

10 56. Carver could not accomplish the bench press, and Eisenga did not allow her to
11 take any other parts of the physical fitness test that day.

12 57. Eisenga told Carver she could come back to try to pass the physical fitness test the
13 next time CPD offered it.

14 58. Combs took all portions of the physical fitness exam and did not pass the last
15 event, i.e., the 1.5 mile run.

16 59. Eisenga invited Combs to come back in two weeks to re-test on the 1.5 mile run.

17 60. When Combs came back for re-testing, Eisenga allowed him to do the 1.5 mile run
18 without having to take and pass the previous physical tests beforehand. That day, Combs
19 satisfied the 1.5 mile run standard.

20 61. On or about May 6, 2008, Kuhlert filed a timely charge of employment
21 discrimination on the basis of sex, and the Civil Rights Division ("Division") commenced an
22 investigation of the charge.

23 62. At the conclusion of the investigation, the Division determined that there was
24 reasonable cause to believe that Defendants discriminated against Kuhlert because of her sex by
25 adopting a physical fitness test that Defendants knew had a disparate impact on female police
26 officers, which Defendants had not validated as job related or consistent with business

1 necessity, and to which less restrictive alternatives existed and had been adopted by state law
2 enforcement agencies, in order to prevent well-qualified female law enforcement officers like
3 Kuhlert and Carver from being promoted or hired. The Division also concluded that there was
4 reasonable cause to believe that Defendants discriminated against Kuhlert because of sex by
5 requiring her to pass the physical fitness test to promote to sergeant in 2007 when General
6 Order 206 provided that sworn personnel like Kuhlert who had been hired before January 1,
7 2007, did not need to pass the physical fitness test until January 1, 2010, and by applying the
8 physical fitness testing policy and performance standards more rigorously against Kuhlert and
9 Carver than against Combs.

10 63. The Civil Rights Division issued its Cause Finding on Kuhlert's May 6, 2008,
11 charge on April 28, 2009, after which the Division, Kuhlert and Defendants did not enter into a
12 Conciliation Agreement.

13 64. The State filed this lawsuit pursuant to A.R.S. § 14-1481(D) on May 5, 2009.

14 65. On or about April 20, 2009, before the Cause Finding was issued, Kuhlert appeared
15 for General Order 206 physical fitness testing. Because she had just finished spinal
16 decompression therapy for the back injury she sustained during the May 2008 physical fitness
17 testing, Kuhlert provided a medical release requesting that she be allowed an alternative test of
18 aerobic fitness to the 1.5 mile run, such as walking 2.0 miles. Kuhlert's release form indicated
19 that there were "no contraindications" to her being capable of performing the essential
20 functions of her job. Kuhlert was told she could take the physical fitness test the next time it
21 was offered.

22 66. According to General Order 206, the purpose of the 1.5 mile run is to measure
23 "aerobic power or cardiovascular endurance (the ability to sustain exertion over time)" and the
24 test "consists of running/walking as fast as safely possible the distance of 1.5 miles."

25 67. On April 30, 2009, after the Cause Finding was issued, Kuhlert received an e-mail
26 from Eisenga notifying her and others that a make-up physical fitness exam for those who

1 were not able to take the exam in April 2009 was scheduled for May 18, 2009, at 8:00 a.m. and
2 5:00 p.m. The email indicated that all recipients would be required to appear and take the
3 physical fitness exam. Kuhlth responded that she still would not be able to do the 1.5 mile run
4 and asked if Eisenga would require another note from her physician.

5 68. On May 1, 2009, Kuhlth was informed by CPD human resources ("HR") that the
6 City was in the process of obtaining clarification from Kuhlth's physician about his comments
7 regarding Kuhlth's inability to complete the 1.5 mile run. HR told Kuhlth that CPD would
8 determine whether it needed another note from Kuhlth's physician after they spoke to him.

9 69. On May 4, 2009, Kuhlth's physician followed up with a Cottonwood worker's
10 compensation claims adjuster in response to the adjuster's letter inquiring about Kuhlth's work
11 restrictions. Kuhlth's physician clarified in writing that he had never recommended work
12 restrictions for Kuhlth. Rather, he indicated that Kuhlth had significant pain after a long run and
13 recommended that she be given an alternative aerobic physical fitness test to the 1.5 mile run.
14 Specifically, he recommended that Kuhlth "should be given the opportunity to walk or ride a
15 stationary bike, as they do in the military."

16 70. Despite Kuhlth's physician's clarification, on May 8, 2009, Detective Kuhlth
17 received written notice from HR that CPD would require her to be examined by an Arizona
18 Peace Officer Standards and Training ("AZPOST")-trained doctor before she could be eligible
19 to take the physical fitness exam. The available examination dates with the AZPOST-trained
20 doctor were May 14, 2009, and anytime on May 18, 2009, the same date as the physical fitness
21 exam.

22 71. Kuhlth informed HR that she was scheduled to be in Phoenix for a financial crimes
23 training on May 13 and 14, 2009. She also indicated that she was scheduled for firearms
24 training at 6:00 p.m. on May 18, 2009, and therefore could only appear for the physical fitness
25 exam at 8:00 a.m. on that day. Accordingly, Kuhlth could not meet with the AZPOST-trained
26 doctor and take the physical fitness on May 18, 2009.

1 72. On May 11, 2009, Kuhlert was informed by Eisenga and her direct supervisor that
2 she could not attend the financial crimes training so that she would be available for
3 examination by the CPD-chosen doctor ("CPD's doctor") on May 13. Eisenga did not explain
4 to Kuhlert the reason why the examination had to take place on May 13 when the doctor initially
5 was only available on May 14 or May 18.

6 73. On May 13, 2009, as required, Kuhlert was examined by CPD's doctor, who
7 informed Kuhlert that, because she could not run without her back becoming sore, she was
8 "disqualified to be a peace officer at this time." CPD's doctor directed Kuhlert to obtain
9 physical therapy and told her that she needed to "have her back cleared" to be a police officer.
10 He further stated in his report that he felt "with rehab she would be able to complete the test
11 without pain." CPD's doctor did not recommend any alternative aerobic fitness test that could
12 replace the 1.5 mile run.

13 74. Fanning placed Kuhlert on light duty immediately after her examination by CPD's
14 doctor, pending receipt of his written report. Kuhlert also was not allowed to take any
15 component of the physical fitness exam, even though her doctor had cleared her to take every
16 component of the exam except the 1.5 mile run, for which he recommended an alternative test.

17 75. CPD did not require Kuhlert to be examined by an AZPOST-trained doctor after she
18 was injured during physical fitness testing in May 2008 or at any time during her treatment for
19 that injury, and it did not place her on light duty during the period of time that she was
20 receiving worker's compensation benefits to pay for those treatments.

21 76. Defendants did not question Kuhlert's medical release or her ability to perform her
22 job duties until after the Division issued the Cause Finding on Kuhlert's May 6, 2008,
23 discrimination charge.

24 77. CPD never followed up with Kuhlert about the physical therapy that CPD's doctor
25 recommended, and a different AZPOST-trained doctor found her fit for duty just five months
26 later with no additional treatment or any change in Kuhlert's back condition.

1 78. During the roughly five-month period that Kuhl was on light duty, she engaged in
2 work activities that were consistent with full duty status with the full knowledge and approval
3 of her supervisors.

4 79. Whereas Kuhl was put on light duty after requesting permission to walk 2.0 miles
5 rather than walk/run 1.5 miles when taking the mandatory physical fitness test, Defendants
6 allowed one male sergeant to be completely excused from taking the physical fitness test for
7 medical reasons without being placed on light duty and allowed a second male officer to be
8 excused from the agility run, the 300 meter run and the 1.5 meter run due to his back condition
9 without assigning that officer to light duty, either.

10 80. As a result of being placed on light duty, Kuhl was prevented from participating
11 in off-duty police activities for which she could have received additional pay.

12 81. On June 9, 2009, Kuhl filed a charge alleging that Defendants retaliated against
13 her after the Division issued the Cause Finding on her May 6, 2008, discrimination charge.

14 82. On April 8, 2010, the Division issued a Second Cause Finding, which alleged that
15 there was reasonable cause to be believe that, because Kuhl opposed Defendants'
16 discriminatory application of the General Order 206 physical fitness test, Defendants retaliated
17 against her by, among other things, denying her an important training opportunity; requiring
18 her to submit to an unwarranted medical examination; and placing her on light duty for five
19 months when similarly situated male officers were not placed on light duty at all.

20 83. On June 2, 2010, Kuhl, the Division and Defendants attempted to conciliate
21 Kuhl's retaliation charge, as well as her disparate impact and disparate treatment claims, in a
22 mediation session with a private mediator. That attempt did not result in a settlement
23 agreement.

24 84. Under a May 6, 2010, tolling agreement, the State and Defendants stipulated to
25 extend the time period during which the State could file a civil action against Defendants
26 and/or move to amend this lawsuit based on Kuhl's retaliation charge until June 18, 2010.

1 85. The State moved to amend its Complaint in this matter to include a claim for
2 retaliation on June 17, 2010.

3 86. In October 2010, Defendants revised General Order 206 to substitute the POPAT
4 for the FIT physical fitness test and standards.

5 87. Revised General Order 206 makes receiving a certain score on the POPAT
6 mandatory for receiving any promotion within the CPD, including promotion to the rank of
7 sergeant.

8 88. Defendants have not performed, or caused to have performed by any outside
9 agency, any study correlating performance on the POPAT with performance of the job duties
10 of a CPD sergeant.

11 89. Defendants have not performed, or caused to have performed by any outside
12 agency, any study correlating performance on the POPAT with performance of any CPD law
13 enforcement position.

14 90. Physical fitness testing conducted pursuant to revised General Order 206
15 demonstrates that, as applied by the CPD, the POPAT has a disparate impact on female police
16 officers who may wish to receive a promotion within the CPD.

17
18 **STATEMENT OF CLAIMS**

19 **COUNT I**

20 **Unequal compensation, terms, conditions or privileges of employment based on sex**
21 **in violation of A.R.S. § 41-1463(B)(1)**

22 91. The State re-alleges and incorporates by reference the allegations contained in
23 paragraphs 1 through 90 of this Complaint.

24 92. Under A.R.S. § 41-1463(B)(1), it is an unlawful employment practice for an
25 employer to discriminate against any individual with respect to compensation, terms,
26 conditions, or privileges of employment because of sex.

1 93. Defendants unlawfully discriminated against Kuhlert in violation of A.R.S. § 41-
2 1463(B)(1) by requiring her to take and pass a physical fitness test that Defendants knew had a
3 disparate impact on women and which Defendants had not validated as job related to the
4 position of sergeant or any other CPD law enforcement position or consistent with business
5 necessity; by requiring Kuhlert to take and pass this test before she could be promoted to
6 sergeant in 2007 and 2008, even though the Order mandating the policy provided that officers
7 like Kuhlert who had been hired before January 1, 2007, did not have to pass the test until
8 January 1, 2010; by denying Kuhlert promotion to the rank of sergeant because she had not
9 passed the invalid and unnecessary physical fitness test; by promoting male officers who were
10 less qualified than Kuhlert in her stead; by relaxing the testing protocols and passing standards
11 for at least one male applicant to the CPD to allow him to enter the police academy while
12 holding Kuhlert and a previously certified female police officer to different, more rigorous
13 standards to prevent them from promoting or being hired by the CPD.

14 94. As a result of Defendants' discrimination, Kuhlert suffered monetary damages for
15 which she should be compensated in an amount to be determined at trial pursuant to A.R.S. §
16 41-1481(G).

17 95. To remedy the effects of Defendants' discrimination, Kuhlert also is entitled to
18 affirmative relief under A.R.S. § 41-1481(G), including but not limited to rightful place
19 reinstatement.

20 96. The State also is entitled to injunctive relief against Defendants' actions pursuant
21 to A.R.S. § 41-1481(G).
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COUNT II

**Limiting, segregating or classifying employees or applicants for employment so as to
deprive them of employment opportunities based on sex in violation of
A.R.S. § 41-1463(B)(2)**

97. The State re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 96 of this Complaint.

98. Under A.R.S. § 41-1463(B)(2), it is an unlawful employment practice for an employer to limit, segregate or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect the individual's status as an employee because of sex.

99. Defendants unlawfully discriminated against Kuhlert in violation of A.R.S. § 41-1463(B)(2) by requiring her to take and pass a physical fitness test that Defendants knew had a disparate impact on women and which Defendants had not validated as job related to the position of sergeant or any other CPD law enforcement position or consistent with business necessity; by requiring Kuhlert to take and pass this test before she could be promoted to sergeant in 2007 and 2008, even though the Order mandating the policy provided that officers like Kuhlert who had been hired before January 1, 2007, did not have to pass the test until January 1, 2010; by denying Kuhlert promotion to the rank of sergeant because she had not passed the invalid and unnecessary physical fitness test; by promoting male officers who were less qualified than Kuhlert in her stead; by relaxing the testing protocols and passing standards for at least one male applicant to the CPD to allow him to enter the police academy while holding Kuhlert and a previously certified female police officer to different, more rigorous standards to prevent them from promoting or being hired by the CPD.

100. As a result of Defendants' discrimination, Kuhlert suffered monetary damages for which she should be compensated in an amount to be determined at trial pursuant to A.R.S. § 41-1481(G).

101. To remedy the effects of Defendants' discrimination, Kuhl is entitled to affirmative relief under A.R.S. § 41-1481(G), including but not limited to rightful place reinstatement.

COUNT III

Discriminating against an employee because she opposed an discriminatory employment practice, filed a charge or participated in a Division investigation in violation of A.R.S. § 41-1464(A)

102. The State re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 101 of this Complaint.

103. Under A.R.S. § 41-1464(A), it is an unlawful employment practice for an employer to discriminate against any of its employees because the employee opposed any practice which is an unlawful employment practice or because the employee made a charge, testified, assisted or participated in any manner in a Division investigation.

104. Kuhl opposed Defendants allegedly discriminatory employment practices by filing her May 6, 2008, charge with the Division. Kuhl participated and gave testimony during the Division's investigation of that charge, which resulted in a Cause Finding against Defendants on April 28, 2009.

105. Because Kuhlt opposed Defendants' discriminatory conduct and participated in the Division's investigation of that conduct, Defendants retaliated against Kuhlt in violation of A.R.S. § 41-1464(A) by, among other things, denying her an important training opportunity; requiring her to submit to an unwarranted medical examination; and placing her on light duty for five months when similarly situated male officers were not placed on light duty at all, purportedly because she was medically "unfit" for duty, although Kuhlt's own physician represented there were "no contraindications" to her performing all her CPD duties.

1 106. As a result of Defendants' discrimination, Kuhlth suffered monetary damages for
2 which she should be compensated in an amount to be determined at trial pursuant to A.R.S. §
3 41-1481(G).

4 107. To remedy the effects of Defendants' discrimination, Kuhlth also is entitled to
5 affirmative and injunctive relief under A.R.S. § 41-1481(G).

6 108. The State also is entitled to injunctive relief against Defendants' actions pursuant
7 to A.R.S. § 41-1481(G).

8 **PRAYER FOR RELIEF**

9 WHEREFORE, the State requests that this Court:

10 A. Enter judgment on behalf of the State, finding that Defendants unlawfully
11 discriminated against Kuhlth because of her sex, and retaliated against her for opposing
12 Defendants' discriminatory employment practices and/or for participating in the Division's
13 investigation of those discriminatory practices, in violation of the Arizona Civil Rights Act.

14 B. Enjoin Defendants, their successors, assigns and all persons in active concert or
15 participation with Defendants, from engaging in any employment practice, including applying
16 invalid and unnecessary physical fitness performance standards that are known to have a
17 disparate impact on women, which discriminates in violation of the Arizona Civil Rights Act.

18 C. Order Defendants to make Kuhlth whole and award Kuhlth back wages
19 representing the difference between the salary Kuhlth would have been paid had she been
20 promoted to sergeant, and the amount that she was paid by Defendants, calculated from
21 February 18, 2007, the first date a male officer was wrongfully promoted in her stead, together
22 with prejudgment interest, in amounts to be determined at trial.

23 D. Order rightful place reinstatement for Kuhlth, including but not limited to
24 promotion to the rank of sergeant retroactive to February 17, 2007, the day before the first
25 male officer was wrongfully promoted in her stead, and adjusting seniority, pension and other
26 benefits calculations accordingly.

1 E. Order Defendants, their successors, assigns and all persons in active concert or
2 participation with Defendants, to create and enforce policies, practices and programs that
3 provide equal employment opportunities for all their employees, and that eradicate the effects
4 of their present unlawful employment practices, including but not limited to policy changes
5 and training.

6 F. Issue an Order authorizing the State to monitor Defendants' compliance with the
7 Arizona Civil Rights Act and order Defendants, its successors, assigns and all persons in active
8 concert or participation with Defendants, to pay the State a reasonable amount for such
9 monitoring.

10 G. Award the State its taxable costs incurred in bringing this action.

11 H. Grant such other and further relief as this Court may deem just and proper in the
12 public interest.

13
14 Dated this 26th day of July , 2011.

15 THOMAS C. HORNE
16 Attorney General

17 By /s/ Jennifer Larson
18 Ann Hobart
19 Jennifer Larson
20 Assistant Attorneys General

21 Original of the foregoing filed electronically
22 with the Clerk of the Maricopa County Superior
23 Court, via azturbocourt.gov this 26th day of
24 July, 2011.

25 A copy of the foregoing has been
26 served via azturbocourt.gov to
the Honorable Dean M. Fink this
26th day of July, 2011.

1 A copy of the foregoing sent via
2 first class mail this 26th day
3 of July, 2011 to:

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